IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-4973

D. C. Docket No. 93-6970-CV-NCR

JAMES DALE SMITH, personally and
on behalf of all others similarly situated,
Plaintiff-Appellant,

versus

CITY OF FORT LAUDERDALE, FLORIDA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 2, 1999)

Before COX and HULL, Circuit Judges, and COHILL*,
Senior District Judge.

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* Honorable Maurice B. Cohill, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

HULL, Circuit Judge:

A Plaintiff-Appellant class of homeless people appeals the district court's decision granting summary judgment for the City of Fort Lauderdale on the class's First Amendment challenge to a City regulation proscribing begging on a certain five-mile strip of beach and two attendant sidewalks. We hold the challenged restrictions on speech are narrowly tailored to serve the City's legitimate interests and thus affirm.

The controversy in this case began when the City of Fort Lauderdale enacted Rules and Park Regulations for City Parks and Beaches, intended "to provide citizens with a safe environment in which recreational opportunity can be maximized." Pursuant to this purpose, the City included in its regulations Rule 7.5, which prescribes regulations "to eliminate nuisance activity on the beach and provide patrons with a pleasant environment in which to recreate." Rule 7.5(c) states, "Soliciting, begging or panhandling is prohibited."[1]

Plaintiffs challenge Rule 7.5(c)'s application to a five-mile strip of beach, a new, one-and-a-half-mile promenade sidewalk between that beach and Highway A1A, and the commercial-area sidewalk on the opposite side of Highway A1A–hereinafter collectively called the "Fort Lauderdale Beach area." The parties stipulate as follows:

> The Fort Lauderdale Beach area is an essential part of the Fort Lauderdale tourism experience. Tourism is one of Florida's most important economic industries, and Fort Lauderdale is the premiere tourist location of

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[1] It is undisputed that "soliciting," "begging," and panhandling" are interchangeable terms. We use the term "begging" to encompass all three.

> Broward County. The Beach area is Fort Lauderdale's number one tourist attraction. Approximately four million tourists, many of whom are from foreign countries, visit the Fort Lauderdale area, and most of them at one time or another visit the Fort Lauderdale Beach area. City attendance records reflect that almost three million people visit the beached annually (August, 1993-July, 1994 estimated figures).
>
> The improvement of the Beach area was a high priority in the City's plan to expand the economic base of the community by attracting new investment. Creating an attractive infrastructure was designed to encourage quality development in the Beach area.

As an initial matter, we note that Rule 7.5(c)'s limitations on begging in the Fort Lauderdale Beach area restrict speech in a public forum. Like other charitable solicitation, begging is speech entitled to First Amendment protection.[2] *See Loper v. New York City Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993) (holding "begging is at least 'a form of speech'" because of the lack of material distinctions between begging and other forms of charitable solicitation); *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (holding charitable organizations' solicitations for contributions are protected speech).

Additionally, this Court's precedent conclusively establishes that the Fort Lauderdale Beach area covered by Rule

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[2] The parties do not raise–and thus we do not address–the issue of whether begging is commercial speech entitled to a lower level of First Amendment protection.

7.5(c)–consisting of beach and sidewalk spaces–is a public forum. *See One World Family Now v. City of Miami Beach*, No. 98-4091, — F.3d — (11th Cir. May 20, 1999) (holding an oceanfront strip of public sidewalk in the historic Art Deco district of Miami Beach to be a "quintessential public forum"); *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548, 1550 (11th Cir. 1997) (confirming the longstanding principle that "[a] sidewalk, although specifically constructed for pedestrian traffic, also constitutes a public forum"); *Naturist Society, Inc., v. Fillyaw*, 958 F.2d 1515, 1521-23 (11th Cir. 1992), (holding John D. MacArthur Beach State Park to be a public forum).

Nonetheless, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area[3] survive Plaintiffs' First Amendment challenge. Even in a public forum, the government may "enforce regulations of the time, place, and manner of expression which [1] are content-neutral, [2] are narrowly tailored to serve a significant government interest, and [3] leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also One World Family Now*, — F.3d at —. Plaintiffs do not dispute that Rule 7.5(c) is content-neutral and leaves open ample alternative channels of communication. Plaintiffs also expressly concede that the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach is "a significant government interest." Plaintiffs argue only that Rule 7.5(c)'s begging restrictions are not narrowly tailored to serve that interest. We disagree.

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[3] On appeal, Plaintiffs challenge Rule 7.5(c) only as applied to begging in the Fort Lauderdale Beach area.

Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area are narrowly tailored to serve the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach. The City has made the discretionary determination that begging in this designated, limited beach area adversely impacts tourism. Without second-guessing that judgment, which lies well within the City's discretion, we cannot conclude that banning begging in this limited beach area burdens "substantially more speech than is necessary to further the government's legitimate interest." *One World Family Now*, — F.3d — (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989)). Rule 7.5(c)'s suppression of begging in the Fort Lauderdale Beach area is materially mitigated by the allowance of begging in streets, on sidewalks, and in many other public fora throughout the City. Cf. Loper, 999 F.2d at 701 (assessing a statute applicable to any "public place" in the state of New York).

Moreover, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area are not rendered unconstitutional by the possible availability of less-speech-restrictive alternatives. Plaintiffs assert that the City's interest might be served by proscribing only hostile or aggressive begging or by confining begging to specific parts of the beach. But Rule 7.5(c) need not be the "least restrictive or least intrusive means" of serving the City's interest in order to qualify as "narrowly tailored." *Ward*, 491 U.S. at 788-89. "So long as the means chosen are not substantially broader than necessary to achieve the government's interests . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 799. Plaintiffs' proffered alternatives fall far short of demonstrating that Rule 7.5(c)'s

prohibition of begging in this Fort Lauderdale Beach area is "substantially broader than necessary."

Thus, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area do not run afoul of the First Amendment, and the district court's grant of summary judgment for the City is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARK CHAD, et al.,

Plaintiffs, Case No.: 93-6970-CIV-ROETTGER

v.

CITY OF FT. LAUDERDALE, ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Defendant.
_____/

THIS CAUSE is before the Court on the parties' cross-motions for Summary Judgment. Upon consideration of these motions and the record in this cause, the Court finds as follows:

SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing, by reference to materials on record, that there are no genuine issues of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 320 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.

2d 604, 608 (11th Cir. 1991). A moving party may discharge this burden by exposing an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325.

If a moving party satisfies this burden, the nonmoving party may not rest upon mere allegations, but must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," establish that a genuine issue of fact remains for trial. *Id.* at 324. A "genuine" dispute as to a material fact exists if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If the record presents issues of material fact, the court must deny the motion. *Id.*

SUMMARY JUDGMENT

A. Pertinent Facts

The controversy in this cause began when Defendant City of Fort Lauderdale (City) enacted Rules and Park Regulations for City Parks and Beaches. The overriding purpose of these regulations was "to provide citizens with a safe environment in which recreational opportunity can be maximized." Pursuant to this purpose, the City included in its regulations Rule 7.5, which delineates regulations "intended to eliminate nuisance activity on the beach and provide patrons

with a pleasant environment in which to recreate." Among these nuisance eliminating regulations, Rule 7.5(c) states, "Soliciting, begging or panhandling is prohibited." The rules further contain an enforcement provision which potentially subjects violators to arrest and prosecution.[1] As specified, these rules apply to the City's beach and to a specific stretch of sidewalk adjacent to the beach. The sidewalk was built in conjunction with the City's redevelopment initiative; this initiative, of which the Beach and Park rules were a part, was designed to expand the community's economic base, and to help protect the City's lucrative and important tourist industry.

On November 12, 1993, Plaintiff Mark Chad, at the time a 44-year-old Broward County resident living in public parks and on beaches, brought suit against the City personally and on behalf of the other estimated 5,000 homeless persons in Broward County.[2] Plaintiffs challenged many of the City's

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[1] Subsection 11.3 provides as follows:

Trespass

Any person or group found in violation of the above rules and regulations shall be ordered to leave all City of Fort Lauderdale parks, beaches and recreation facilities for a minimum 24-hour period. Any person who fails to leave all facilities, parks or beach (sic) at the time requested may be arrested and prosecuted for trespassing or prosecuted under other existing ordinances.

[2] During the pendency of this action Plaintiff Chad died. However, this Court's August 27, 1997 Order granted Plaintiff's motion for nunc pro tunc class certification as of February 9, 1994. The Plaintiff class is described as "homeless persons in Broward County, including those who beg or panhandle within the area designated by the City to be the Fort Lauderdale beach area." Chad, although deceased, remains by this August 27th Order the named class representative. The vitality of this action and the

new regulations as unconstitutional. In the course of this suit, various events determined the fate of all but one of the claims alleged in Plaintiffs' complaint. The lone issue before this Court, then, concerns the constitutionality of Rule 7.5(c).

The Court has previously addressed some of the First Amendment issues Plaintiffs have raised as to the enforcement of Rule 7.5(c). On June 20, 1994, the Court denied Plaintiffs' motion for a preliminary injunction. In the Order of denial, the Court, scrutinizing the rule under established principles for determining constitutionality, found that Fort Lauderdale beach and the adjacent sidewalk do not qualify as a public forums. As such, Rule 7.5(c) is constitutional as long as the rule is viewpoint neutral, and reasonable in light of the stated purpose of improving the safety, economic viability and aesthetics of the beach. Upon review of the facts, the Court determined that the rule is viewpoint neutral, and reasonable in light of its purpose. Alternatively, the Court found that even if the beach and sidewalk were public forums, Rule 7.5(c) would still be constitutional as it represents a reasonable time, place, and manner restriction on protected speech.

In their present motion for summary judgment, Plaintiffs purport new arguments in support of their position that Rule 7.5(c) is unconstitutional. Namely, Plaintiffs contend that the rule is vague, overbroad, or both, in violation of the

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present motions for summary judgment is reinforced by Fed. R. Civ. P. 25(a)(2), which provides in part, "In the event of the death of one or more of the plaintiffs. . . in an action in which the right sought to be enforced survives only to the surviving plaintiffs . . . the action does not abate . . . . [T]he action shall proceed in factor of or against the surviving parties."

Fourteenth Amendment and, as an unconstitutional limitation on speech, the First Amendment.

B. Void-for-Vagueness

The void-for-vagueness doctrine is linked to the Due Process clause of the Fourteenth Amendment. Generally, the doctrine is rooted in notions of providing "fair notice and warning" to citizens of what any particular legislation prohibits or allows. The doctrine requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact to prevent "arbitrary and discriminatory enforcement." *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). "Reasonably clear" does not, however, require that every law be so crystal clear as to preclude every single vagary or difference of opinion regarding enforcement under any scenario. *c.f. Grayned v. City of Rockford*, 408 U.S. 103, 110 (1972). Rather, "reasonably clear," in the due process context, means simply that the people must be informed as to what the State commands or forbids so that a person of ordinary intelligence can gear his behavior accordingly. *See, e.g. Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), *Grayned*, 408 U.S. at 108-9. These standards may be boiled down to two inquiries: whether there has been sufficient notice, and whether the legislature has established clear minimal guidelines to govern law enforcement. *See, e.g., id.*

Focusing on this latter element, the minimal guidelines requirement, Plaintiffs contend that Rule 7.5(c) is so vague as to confound law enforcement officials about what the rule forbids. Plaintiffs not that while the rule prohibits "begging,

panhandling, or solicitation," it does not define what those terms mean, or to whom they apply. Plaintiffs point to the fact that although all of the rule's salient terms involve "asking for" something, there is no other limiting language. Rather, Plaintiffs argue, the rule encompasses much more than "nuisance speech" or aggressive speech, but proscribes courteous communication as well. This proscription of courteous speech, Plaintiffs contend, is the rule's "fatal flaw." As Plaintiffs illustrate, asking for help to repair a flat tire falls under the rule's scope, as well as asking for a quarter, soliciting political support, asking for Red Cross donations, and the like. Because all types of "asking," whether it be aggressive asking or courteous asking, may be prohibited, Plaintiffs conclude that the rule is vague.

The Court disagrees. Indeed, the various examples of solicitation Plaintiffs cite, ostensibly in support of their argument, in fact illustrate that the rule is not vague; rather, the rule is easily applied to each of Plaintiffs' scenarios. The absence of more limiting language than the terms themselves, "begging, panhandling, solicitation," is the very thing that saves the rule from vagueness. Had the City attempted to tailor the rule to only "aggressive" types of solicitation, the rule might very well have failed; the question of what is "aggressive speech" may have sealed its fate. Moreover, the lack of definitions for the terms does not render them vague. Rather, they are common words, known to everyone with ordinary intelligence, and are used in a single straight-forward declaratory sentence.

Further, the Court finds that Plaintiffs' reliance on the

rule's proscription of "courteous speech" is misplaced. This argument rides on the dubious assumption that courteous speech may not be intrusive or annoying. Putting aside the subjective vagaries of what is "courteous," the most gentle and deferential approach still must necessarily involve the sacrifice of the listener's privacy. Any solicitation, whether it be for funds or for support or for help, involves some degree of encounter, and most often is accompanied by some depth of explanation. The courteousness of an encounter may have little or nothing to do with its capacity to be a nuisance, depending, as always, upon the nature of the listener. In any event, the degree to which a law prohibits courteous solicitation has no bearing on whether that law is vague. For these reasons, the Court finds that the language of the rule, while flexible and broad in the sort of "asking for" behavior it covers, is nevertheless sufficiently clear as to what it prohibits. Thus, the constitutionality of Rule 7.5(c) is not defeated for vagueness.

C. Overbreadth

The next issue is whether Rule 7.5(c) is overbroad. No matter how clear legislation may be, the legislation may still be unconstitutional if it prohibits constitutionally protected behavior. *Grayned*, 408 U.S. at 115. In this case, Plaintiffs argue that the rule is overbroad in that it prohibits speech protected under the First Amendment.

The threshold issue with respect to Plaintiffs' overbreadth argument is whether begging, panhandling and solicitation are types of expression entitled to First Amendment protection. In this respect, Defendant argues that begging has

been held to lack the necessary particularization of a message required to warrant constitutional protection. *Citing Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990). However, the United States Supreme Court has made clear that certain types of solicitation are entitled to First Amendment protection. *See United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Schamburg v. Citizens for Better Environment*, 444 U.S. 620, 633 (1980). Since Rule 7.5(c) is broad enough to subsume ordinary begging, favor seekers, and commercial or political solicitors alike, the Court finds that the rule covers conduct protected by the First Amendment.

Clearing this threshold hurdle, Plaintiffs Challenge some of the Court's findings in the June 20, 1994 Order. As discussed, this Court found that even if the beach and the adjacent sidewalk were considered public forums, Rule 7.5(c) still qualifies as a reasonable time, place and manner restriction on protected speech.[3] To satisfy time, place and manner requirements, a regulation must be content neutral, it must be narrowly tailored to serve a significant governmental interest, and must it leave open ample alternative channels for communication.

In determining that Rule 7.5(c) is content neutral, the

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[3] The Court is compelled to reiterate its position that both the beach and the adjacent sidewalk are non-public forms. This reasoning canvassed therein provides the initial basis of the Court's finding that Rule 7.5(c) is constitutional. It was as an alternative to this non-public forum basis that the Court determined the rule to be a reasonable time, place and manner restriction on free speech. The Court in no way retreats from that reasoning today.

Court found that the rule "applies even-handedly to persons aspiring to solicit, beg or panhandle along the City's beach and adjacent sidewalk regardless of their agenda." Plaintiffs now argue that this determination "overlooks" the fact that the proscribed "asking for" types of speech are singled out from other permissible speech, such as oratory, handbill distribution, or picketing. Because the rule isolates this sort of "asking for" speech, Plaintiffs content that the rule is content based.

Plaintiffs new argument does not change the Court's previous analysis. A "type of speech" has nothing to do with the content of the speech itself; rather, it is the form - - begging, solicitation - - through which the message is conveyed that is banned, and is banned in all cases regardless of what the purpose or message behind the begging or solicitation may be. This form is simply a way of communicating, and does not in of itself have content. Accordingly, the Court reaffirms its finding that Rule 7.5(c) is content neutral.

Plaintiffs further challenge the Court's prior determination in the June 20, 1994 Order that Rule 7.5(c) is narrowly tailored. A rule is narrowly tailored as long as it promotes a significant governmental interest that would be less effectively accomplished without it. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 297 (1984). In light of this standard, this Court found that the City has a significant interest in eliminating nuisance activity along the beach, and in promoting a safe, healthful, and aesthetic environment in which recreational activity can be maximized. As the Order further discussed, the City's beach is famous, unique, and its chief asset; the beach's redevelopment and rehabilitation play a vital

role in the financial well-being of the City. On the strength of these facts, the Court found that promoting and protecting the safety and aesthetics of the City's beach is a significant governmental interest. To this end, the Court concluded that Rule 7.5(c) properly furthers legitimate governmental interests which would be less well served without the rule.

Plaintiffs now contend that while the rule purports to eliminate nuisance activity and provide a pleasant environment, the rule is not "narrowly tailored" toward this purpose. Rather, Plaintiffs argue, the rule covers all begging, panhandling and solicitation, and not just the aggressive, intrusive, threatening types of begging and solicitation. However, as discussed, and affirmative encounter that would qualify as begging or solicitation is inherently disruptive to one's privacy; any act covered under the rule could be construed as a nuisance. The Court concludes, therefore, that Rule 7.5(c) is narrowly tailored to serve a significant governmental interest.

Accordingly, the Court finds that Rule 7.5(c) does not infringe upon protected First Amendment rights, and is thus not overbroad.

CONCLUSION

For these reasons, and for the reasons further discussed in this Court's June 20, 1994 Order, the Court finds that Rule 7.5(c) is, over Plaintiffs' challenges, constitutional. Therefore it is

ORDERED AND ADJUDGED that Defendants'

motion for summary judgement is GRANTED. Judgement is hereby entered in favor of Defendant.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's motion for summary judgement is DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that all pending motions are DENIED as moot. The Clerk of the Court is hereby directed to close this case.

DONE AND ORDERED this 27 day of May, 1998.

/s/
NORMAN C. ROETTGER
UNITED STATES DISTRICT
COURT JUDGE

cc: Bruce Rogow
Beverly Pohl
Lindsey Payne

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARK CHAD, personally and on behalf of all others similarly situated; and Angela M. Greene, individually,

Plaintiffs,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Defendant.

Case NO. 93-6970-CIV-ROETTGER

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

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ROETTGER, Chief Judge.

THIS CAUSE is before the court upon plaintiffs' emergency motion for preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure to prevent Defendant City of Fort Lauderdale, Florida (hereinafter "City") from enforcing several of defendant's Rules and Regulations for City Parks and Beaches as violative of the United States Constitution. The court has jurisdiction pursuant to Title 28, United States Code, Sections 1331 and 1343(3).

Plaintiffs challenged the constitutionality of the following rules: 1) Park Rule 2.2 which prohibits businesses or social services from operating in parks without a written agreement with the City; 2) Park Rule 4.6 which bans sleeping or

reclining in designated areas of the City's parks; 3) Park Rule 4.9 which forbids the storing of personal property in any park or facility except in specified storage areas; 4) Beach Rule 7.5(c) which bans soliciting, begging or panhandling; and 5) Beach Rule 7.5(d) which disallows the removal of trash and debris from waste receptacles in the absence of written permission from the Parks and Recreation Department

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Plaintiffs originally sought to enjoin the enforcement of all five of the above-named rules against him and others similarly situated, but now he seeks preliminary injunctive relief only as to Beach Rule 7.5(c) prohibiting soliciting, begging or panhandling on Fort Lauderdale's beach and its abutting sidewalk.

FACTS

Plaintiff Chad alleges he is a 44-year-old Broward County resident who lives in public parks and on beaches day and night. He claims to have been homeless for four years. He is allegedly unemployed, disabled and indigent. He allegedly depends on others for food, shelter and other essentials. Plaintiff Chad sues the City personally and on behalf of the other estimated 5,000 homeless persons in Broward County who want to solicit contributions of money and food on Fort Lauderdale beaches. He has not been arrested for solicitation or threatened with a summons.

On July 20, 1993, Defendant City adopted several new rules and regulations for its parks and beaches "to provide citizens with a safe environment in which recreational opportunity can be maximized." See Rules and Regulations for

City Parks and Beaches contained in Resolution 93-143. The beach regulations are set forth in Section 7. Challenged Beach Rule 7.5(c) simply provides that "[s]oliciting, begging or panhandling [on Fort Lauderdale's beach] is prohibited." It is one of several beach regulations intended "to eliminate nuisance activity on the beach and provide patrons with a pleasant environment in which to recreate." *Id.* The rules contain an enforcement provision in Section 11 which potentially subject violators to arrest and prosecution.[1]

PRELIMINARY INJUNCTION

The court is faced with the narrow question of whether a preliminary injunction should issue to preserve the status quo until trial on the merits. *Northeastern Florida Chapter v. Jacksonville*, 896 F.2d 1283, 1284 (11th Cir.1990). Technically, plaintiffs seeks to preserve the status quo prior to the adoption of Beach Rule 7.5(c); the testimonial evidence presented at the evidentiary hearing revealed the City has been enforcing the rule since its passage in late July.

In the Eleventh Circuit, a preliminary injunction will

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[1] Subsection 11.3 provides, as follows:

> Trespass
> Any person or group found in violation of the above rules and regulations shall be ordered to leave all City of Fort Lauderdale parks, beaches and recreation facilities for a minimum 24-hour period. Any person who fails to leave all facilities, parks or beach (sic) at the time requested may be arrested and prosecuted for trespassing or prosecuted under other existing ordinances.

issue when the movant shows each of the following: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if an injunction does not issue; (3) proof that the threatened injury to movant outweighs the potential harm caused to the nonmovant; and (4) a showing that the injunction would not disserve public interests. *Id.*; *Cunningham v. Adams*, 808 F.2d 815, 819 (11th Cir.1987); *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974).

A. Likelihood of Success on the Merits

Plaintiff Chad and members of the plaintiff class claim to have a First Amendment right to solicit, beg and panhandle on the City's public beach. Plaintiff Chad alleges Rule 7.5(c) violates his constitutional rights because it absolutely and unequivocally bans protected communicative conduct based on the content of the message.[2] Defendant argues in response that the acts of soliciting, begging and panhandling are "not unquestionably protected by the First Amendment."

Solicitation of funds is an activity that may receive First Amendment protection. *International Soc. for Krishna Consciousness, Inc. v. Lee*, --- U.S. ----, ----, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992); *United States v. Kokinda*, 497 U.S. 720, 725, 110 S.Ct. 3115, 3118-19, 111 L.Ed.2d 571 (1990); *Heffron v. International Soc. for Krishna*

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[2] Plaintiffs have the burden of demonstrating that the allegedly expressive conduct is protected by the First Amendment. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 n. 3, 104 S.Ct.3065, 3068-69 n. 3, 82 L.Ed.2d 221 (1984).

Consciousness, Inc., 452 U.S. 640, 647, 101 S.Ct. 2559, 2563-64, 69 L.Ed.2d 298 *1060 (1981). Courts have similarly held that begging is at least a form of speech. *See Lee*, --- U.S. at ----, 112 S.Ct. at 2705 (parties agreed begging implicated First Amendment concerns); *Loper v. New York City Police Dept.*, 999 F.2d 699, 705 (2d Cir.1993); *City of Seattle v. Webster*, 115 Wash.2d 635, 802 P.2d 1333 (1990) (en banc), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991). Neither party cited any authority distinguishing panhandling from begging. *See Blair v. Shanahan*, 775 F.Supp. 1315, 1326 (N.D.Cal.1991) (panhandler successfully challenged San Francisco ordinance banning begging in all public places).

At least one court has determined that soliciting on a Florida beach constituted commercial speech and therefore was not entitled to as much constitutional protection as ideological speech. *Resort Dev. Int'l, Inc. v. City of Panama City Beach*, 636 F.Supp. 1078, 1083 (N.D.Fla.1986). As in *Resort Dev. Int'l, Inc.*, the rule at issue does not involve a content-based regulation of speech that is political, ideological or artistic in nature.[3] *See Consolidated Edison Co. v. Public Serv. Comm'n*,

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[3] Panama City Beach's Ordinance No. 297, stated in part:

> No person shall solicit or canvass for the sale or rental of merchandise, services, goods, or property of any kind or character, in, upon, or from the sand beach areas between the waters of the Gulf of Mexico and the Coastal Line established by the State of Florida, Department of Natural Resources.

The ordinance further defined "solicit or canvass" to mean:

447 U.S. 530, 536, 100 S.Ct. 2326, 2332-33, 65 L.Ed.2d 319 (1980).

Assuming, without deciding, that the expressive conduct at issue is protected, the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. *Lee*, --- U.S. at ----, 112 S.Ct. at 2705; *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981). Government's ability to restrict First Amendment activity depends upon the nature of the forum involved. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 3447-48, 87 L.Ed.2d 567 (1985).

Under this forum-based analysis, regulation of speech on government property that has traditionally been available for public expression, such as streets and parks, is subject to the highest scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). These regulations survive only if they are narrowly drawn to achieve a compelling governmental interest. *Id.* A comparable standard applies to property that is not a traditional public forum, but which has been deliberately set aside by the

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any act, delivery or exchange not initiated by the prospective customer, which directs attention to any business, mercantile or commercial establishment, or any other commercial activity, for the purpose of directly or indirectly promoting commercial interests through sales, rentals or any exchanges of value.

See Resort Dev. Int'l, Inc. v. Panama City Beach, 636 F. Supp. at 1084.

government as a locale for expressive conduct. *Id.* at 45-46, 103 S.Ct. at 954-55. The government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449. Examples of designated public forums include municipal auditoriums dedicated to communicative conduct and school facilities available for use by student groups. *Id.* at 802-03, 105 S.Ct. at 3449-50. With regard to all remaining public property, the government may regulate First Amendment conduct as long as its regulations are reasonable and viewpoint neutral. *Perry Educ. Ass'n*, 460 U.S. at 46, 103 S.Ct. at 955-56.

Accordingly, the court must determine whether Beach Rule 7.5(c) prohibits protected expressive conduct in a public or nonpublic forum.[4] The City has explained that the rule bans begging, soliciting and panhandling on Fort Lauderdale's beach which is bounded by Oakland Park Boulevard to the north, the Sheraton Yankee Clipper Hotel to the south and Highway A1A to the west. The rule also applies to the new sidewalk adjacent to the beach immediately east of Highway A1A. The sidewalk stretches from the south beach parking lot to Sunrise Boulevard but not northward another two miles to Oakland Park Boulevard.

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[4] Forum analysis is very fact specific. The court notes that at this preliminary juncture neither party has supplied it with maps, diagrams, or any visual aids of the area in question. *See Searcey v. Crim*, 815 F.2d 1389, 1392-93 (11th Cir.1987) ("[d]etermining what type of public forum exists requires development of the relevant facts that bear upon the character of the property at issue").

Plaintiffs claim the rule impermissibly bars speech in a public forum because it spans the sidewalk abutting the beach and sidewalks constitute quintessential public forums. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). The Supreme Court, in guaranteeing the right to picket on public sidewalks outside of its building, said:

> public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered without more, to be "public forums." In such places, the government's ability to permissibly restrict expressive conduct is very limited ...

United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983) (emphasis added) (Court concluded that the sidewalks along the outer boundaries of the Supreme Court grounds are indistinguishable from other sidewalks in Washington, D.C. and constitute a public forum). Nevertheless, not all sidewalks are public forums. *See, e.g., Greer v. Spock*, 424 U.S. 828, 835-37, 96 S.Ct. 1211, 1216-17, 47 L.Ed.2d 505 (1976) (military base sidewalk is not public forum); *Kokinda*, 497 U.S. at 727, 110 S.Ct. at 3119- 20 (post office sidewalk is not public forum; *International Soc. for Krishna Consciousness, Inc. v. City of New York*, 504 F.Supp. 118, 126-29 (1980) (court upheld solicitation ban on one small sidewalk outside of the United Nations building as tenable time, place and manner restriction).

Plaintiffs also contend the Eleventh Circuit has already determined that all beaches are parks and, therefore, constitute

classic public forums devoted to assembly and debate. *See Naturist Soc. Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir.1992). However, the Eleventh Circuit did not squarely hold that all beaches are public forums in *Fillyaw*; it merely determined that the John D. MacArthur Beach State Park was a public forum. *Id.* at 1516. The Eleventh Circuit said the park was more than a beach because it contained walkways, parking lots and a nature center. Id. at 1522. To underscore this distinction, the Court noted that:

> [s]peech and expressive conduct in these areas may not pose the same evils as on the beach. In declaring the park a non-public forum based solely upon its beach characteristics, the district court ignored other areas of the park which are not beach.

Id. In *Fillyaw*, the Eleventh Circuit iterated its position that parks are classic public forums. *Id.*

Public property does not become a public forum simply because members of the public may come and go at will. *See Greer*, 424 U.S. at 836, 96 S.Ct. at 1216-17. The government, just as private property owners, may maintain property under its control for "the use to which it is lawfully dedicated." *Grace*, 461 U.S. at 178, 103 S.Ct. at 1707.

The Supreme Court has recently reaffirmed that a traditional public forum is one in which its principal purpose is the free exchange of ideas. *Lee*, --- U.S. at ----, 112 S.Ct. at 2706. A public forum is a place that has "immemorially been held in trust for the use of the public and, time out of mind," has been "used for purposes of assembly, communicating

thoughts between citizens, and discussing public questions." *Id. quoting Hague v. Committee for Indus. Organ.*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 963-64, 83 L.Ed. 1423 (1939).

Given the above standard, the court concludes that plaintiffs have not established that either the sidewalk east of Highway A1A or Ft. Lauderdale's beach constitute a forum for public communication by tradition or designation. The sidewalk is new and small; it does not even extend the full length of the beach. It was created to accommodate traffic to and from the beach and, only having been built two years ago, has not been a traditional site for expressive conduct. Plaintiffs have not established the sidewalk is indistinguishable from others in Fort Lauderdale. *See Grace*, 461 U.S. at 179-80, 103 *1062 S.Ct. at 1708-09. Even if the court later determines, upon receipt of additional evidence, that the sidewalk is a public forum, it is doubtful the beach will fall into the same category. The sidewalk, contoured concrete sand barrier wall and newly constructed portals demarcate the beach as a special area subject to greater restriction. *See Lee*, --- U.S. at ----, 112 S.Ct. at 2706.

The regulation of expressive activity on public property deemed not to be a public forum is subject only to a limited review--the regulation must be reasonable and not designed to prohibit the activity merely because of disagreement with the views expressed. *Perry Educ. Ass'n*, 460 U.S. at 46, 103 S.Ct. at 955-56; *Lee*, --- U.S. at ---- - ----, 112 S.Ct. at 2706-08 (airport terminals were classified as nonpublic forums and the regulation prohibiting solicitations passed after being subject only to a reasonableness review); *Kokinda*, 497 U.S. at 730, 110 S.Ct. at 3121-22 (postal service regulation prohibiting

solicitation on a sidewalk leading from a parking lot to a post office submitted only to a reasonableness review). Access to a nonpublic forum may be based on topic and speaker identity as long as the distinctions drawn are viewpoint neutral and reasonable in light of the forum's purpose. *Perry Educ. Ass'n*, 460 U.S. at 49, 103 S.Ct. at 957.

Beach Rule 7.5(c) should easily pass muster under this rubric. The rule is clearly viewpoint neutral; it bans all begging, solicitation and panhandling without regard to a certain perspective. Furthermore, it is reasonable in light of the purpose the property is intended to serve. That is, one could reasonably conclude that permitting solicitation activities might disrupt unwary beach patrons. Such activities could impede the beach's use for its intended purpose which is recreational pleasure and enjoyment. The Eleventh Circuit has already noted the distinction between distributing literature and the solicitation of funds:

> [s]oliciting funds is an inherently more intrusive and complicated activity than is distributing literature. A passerby can take a pamphlet and keep walking. Soliciting funds, on the other hand, can require an extended encounter. It might be necessary to make correct change, provide a receipt, or engage in a prolonged explanation of the organization and its activities. In sum, solicitation is more time consuming and is likely to cause greater confusion and disruption.

United States v. Belsky, 799 F.2d 1485, 1489 (11th Cir.1986); *see also Heffron*, 452 U.S. at 665, 101 S.Ct. at 2572. The City

is legitimately concerned about maintaining a safe beach and minimizing nuisances in its so- called "tourist zone." Lastly, the City has a legitimate interest in maintaining the aesthetics of the beach--its primary tourist attraction--and in keeping the walkway bordering it unobstructed. *See United States v. Gilbert*, 920 F.2d 878, 886 n. 8 (11th Cir.1991) (government may legitimately exercise its police powers to advance aesthetic values); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805, 104 S.Ct. 2118, 2128-29, 80 L.Ed.2d 772 (1984). *Harnish v. Manatee County*, 783 F.2d 1535, 1539 (11th Cir.1986) ("Aesthetics is a substantial governmental goal which is entitled to and should be accorded weighty respect"). The court notes that, in order to be upheld, the regulation need not be "the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808, 105 S.Ct. at 3452; *Belsky*, 799 F.2d at 1489.

However, even if Ft. Lauderdale beach is ultimately deemed to be a park and, consequently, a public forum, the court finds the City's regulation appears to be a reasonable time, place and manner restriction. The Supreme Court has held that:

> [i]n ... quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of

communication.

Perry Educ. Ass'n, 460 U.S. at 45, 103 S.Ct. at 955. The constitutionality of a time, place and manner restriction turns on whether: 1) the regulation is content neutral; 2) the regulation is narrowly tailored to serve a significant governmental interest; 3) the regulation leaves open ample alternative channels for communication. *Id.; Heffron*, 452 U.S. at 648- 50, 101 S.Ct. at 2564-65; *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). In addition, consideration of a forum's special attributes is relevant to the constitutional inquiry as the "significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 650-51, 101 S.Ct. at 2565-66; *Perry Educ. Ass'n*, 460 U.S. at 44, 103 S.Ct. at 954.

The main inquiry in determining content neutrality is whether the government is regulating speech because of disagreement with its message. *Clark*, 468 U.S. at 295, 104 S.Ct. at 3069-70. The governmental aim is the controlling consideration. Id. Government's regulation of expressive conduct is content neutral if it is "justified without reference to the content of the regulated speech." *Id.* at 293, 104 S.Ct. at 3069.

Beach Rule 7.5(c) is content neutral; it applies evenhandedly to persons aspiring to solicit, beg or panhandle along the City's beach and adjacent sidewalk regardless of their agenda. The principal justification behind the rule is to maintain safety on the beach and to preserve it for recreational

activity. This justification is content neutral. Furthermore, like the federal postal regulation upheld in *Belsky* and *Kokinda*, the rule does not appear to prohibit the distribution of literature or the exercise of free speech rights in the absence of an immediate financial solicitation. *See Belsky*, 799 F.2d at 1487.

Second, the City's interest in promulgating the Beach Rule 7.5(c) is significant. As previously set forth, the City has a legitimate interest in eliminating nuisance activity on its famous beach and providing citizens and patrons with a safe, aesthetic, pleasant environment in which recreational opportunity can be maximized. *See* Resolution 93-143; *See also Resort Dev. Int'l, Inc.*, 636 F.Supp. at 1083 (city had significant interest in "protecting its beaches from nuisances and in prohibiting unreasonable interferences with the flow, recreation, enjoyment, and privacy of persons ... on the sand beach areas"); *Clark*, 468 U.S. at 296-97, 104 S.Ct. at 3070-71 (government has substantial interest in maintaining Washington D.C. parks in an "attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence.")

Maintaining a safe beach or "tourist zone" is of paramount concern to the financial future and growth of the City. Fort Lauderdale's beach is unique; no development is permitted East of A1A. Fort Lauderdale's beach, unlike most Florida beaches, is not barricaded by rows of houses, hotels and condominiums. The ocean view is preserved for all passersby. The beach is maintained for tourists and residents alike. As discussed above, the beach is the City's chief asset. The beach's rehabilitation and redevelopment as a resort destination plays an integral part in the City's economic development plans.

Protecting the safety, peace, comfort and convenience of persons using public property is a valid governmental goal. *Heffron*, 452 U.S. at 650, 101 S.Ct. at 2565; *Cantwell v. Connecticut*, 310 U.S. 296, 306-07, 60 S.Ct. 900, 904-05, 84 L.Ed. 1213 (1940). A rule is narrowly tailored as long as it promotes a significant governmental interest that would be less effectively accomplished without it. *Clark*, 468 U.S. at 297, 104 S.Ct. at 3071. Considering the justifications tendered by the City, the rule appears to further its legitimate governmental interests which would be less well served otherwise.

Finally, Beach Rule 7.5(c) leaves open ample alternative channels for communication as it applies only to the beach area, not to all City recreational property or parks, and affects a mere fraction of the City's public sidewalks. *See, e.g., Loper*, 999 F.2d at 705 (striking down an ordinance banning begging on all of the sidewalks in New York City); *Blair*, 775 F.Supp. at 1326 (striking down San Francisco ordinance prohibiting begging in all public places).

In light of the fact that Beach Rule 7.5(c) is a content-neutral time, place and manner restriction on expressive conduct justified by the City's concern in eliminating nuisances to maintain a safe tourist zone in only a minuscule section of the City, the court finds plaintiffs are unlikely to succeed on the merits. The First Amendment does not guarantee the right to beg, panhandle or solicit whenever, however and wherever one pleases. *Heffron*, 452 U.S. at 647, 101 S.Ct. at 2563-64.

B. Likelihood of Irreparable Harm

Plaintiff Chad has adequately established that he and his class, if certified, may sustain irreparable injury unless defendant is enjoined from enforcing Beach Rule 7.5(c). An injury is irreparable if it cannot be undone through monetary remedies. *Spiegel v. Houston*, 636 F.2d 997 (5th Cir.1981). The Supreme Court has said that any loss of First Amendment freedoms--even for minimal periods of time--can constitute irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). The Eleventh Circuit has likewise held that on-going violations of the First Amendment constitute irreparable injury because chilled free speech, due to its intangible nature, cannot be redressed through monetary damages. *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir.1993); *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir.1983).

In this case plaintiffs risk arrest for what might later be deemed wholly innocent conduct. The harm caused by the restraint placed upon plaintiffs' First Amendment freedoms cannot be remedied by an award of monetary damages. Therefore, irreparable injury must be assumed.

C. Balance Between Harm to Plaintiffs and to Defendant

In its analysis on plaintiffs' likelihood of success on the merits, the court has already found that the City's interest in maintaining a safe "tourist zone" outweighs plaintiffs' interest in soliciting, begging or panhandling on its beach. The City's need to mediate competing uses for public property is

unavoidable. Ft. Lauderdale beach is a unique resource the City must keep in trust for the vast numbers of its visitors and patrons. *Clark*, 468 U.S. at 290, 104 S.Ct. at 3067.

D. Balancing of Public Interest

The Court finds that the public interest will not be disserved by denial of a preliminary injunction in this case. It is in the public interest to maintain the safety of Ft. Lauderdale's beach and the court has determined that defendant's Beach Rule 7.5(c) does not appear to violate fundamental rights.

Since plaintiffs have not carried the burden of persuasion with regard to all four prerequisites for the issuance of a preliminary injunction in accordance with *Canal Auth.*, 489 F.2d at 572, it is

ORDERED AND ADJUDGED that plaintiffs' motion for preliminary injunction is DENIED.

DONE AND ORDERED this 20 day of June, 1994.

/s/
NORMAN C. ROETTGER
CHIEF JUDGE

cc: counsel of record